Tentative Rulings for May 2, 2019
Departments 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

18CECG03565 ***Tosi v. Peterson*** **both motions are continued to Thursday, May 9, 2019 at 3:30 p.m. in Dept. 403.**

18CECG03586 ***Lifestyle Solar v. Whelan*** **is continued to Thursday, May 16, 2019, at 3:00 p.m. in Department 501.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(20) **Tentative Ruling**

Re: ***Esteras v. JD Home Rentals***
Case No. 19CECG00355

Hearing Date: May 2, 2019 (Dept. 403)

Motion: Demurrer to First Amended Complaint

Tentative Ruling:

To take the demurrer off calendar due to failure to comply with Code of Civil Procedure section 430.41.

Explanation:

The demurring must party to meet in confer, *in person or by telephone*, prior to filing a demurrer, including a demurrer to an amended pleading. (Code Civ. Proc. § 430.41(a).) The demurring party must file and serve with the demurrer a declaration detailing the meet and confer efforts. (Code Civ. Proc. § 430.41(b).) Counsel's declaration shows that there was no meet and confer, much less in person or by telephone, prior to filing the demurrer to the First Amended Complaint. (Armo Dec. ¶ 5.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/24/19.
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***Peraza et al. v. Walker-Lewis, Inc. et al.***
Superior Court Case No. 16CECG03149

Hearing Date: May 2, 2019 (Dept. 403)

Motion: Defendants' motion to enforce the settlement with plaintiffs

Tentative Ruling:

To grant defendants' motion to enforce settlement. Code of Civil Procedure section 664.6. The Court enters judgment in favor of plaintiffs Gilberto Peraza and Irma Peraza in the aggregate total of $60,000. Plaintiff shall execute a release and dismissal with prejudice. Each party to pay their own attorney's fees and costs. Plaintiffs are responsible for the payment of all liens. Plaintiffs shall execute the release and dismissal immediately. Upon receipt of the executed release and dismissal, defendants shall tender payment.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/30/19 .
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Laura Burke v. Clovis Unified School District***
Superior Court Case No. 19CECG00473

Hearing Date: May 2, 2019 (Dept. 403)

Motions: Petition to File a Late Government Claim, by: Laura Burke, Cindy Promnitz, Rachel Burke, and Maddie Promnitz

Tentative Ruling:

To deny.

Explanation:

Under Government Code section 946.6, "[i]f an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4." (Gov't. Code § 946.6, subd. (a).) Under section 946.6, subdivision (c), "The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 [*e.g.,* no more than one year after the claim accrued] and was denied or deemed denied pursuant to Section 911.6," and that one or more of the conditions listed in Government Code section 946.6, subdivision (c) are applicable. (Gov't. Code § 946.6, subd. (c).)

Thus, the "[f]iling [of] a late-claim application within one year after the accrual of a cause of action is a jurisdictional prerequisite to a claim-relief petition. When the underlying application to file a late claim is filed more than one year after the accrual of the cause of action, the court is without jurisdiction to grant relief under Government Code section 946.6." (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1779.)

Here, petitioners claim the accrual of their causes of action occurred "on or about June 2017, when Schiro no longer had a position of control over Petitioners Rachel and Maddie as the Director of CHS Pep and Cheer and their PE teacher." (Pet., p 13, ln 10.) Although petitioners fail to give an exact date, the last day of the 2016-2017 school year occurred on June 9, 2017. This is the last date Schiro would have any possible control or influence over the students. Yet, petitioners filed their claim in this matter – on a CUSD Complaint Form with the District, on June 25, 2018. Thus, petitioners' claim was filed more than a year after the accrual of their causes of action, or passed the six-month window.

Furthermore, there is no question that petitioners filed their Application For Leave to File a Late Claim with CUSD on August 28, 2018. This is more than fourteen months after the accrual of petitioners' causes of action, or more than two months after the time to file a late claim with the District had passed.

Therefore, because the June 25, 2018 claim falls outside of the six-month window prescribed by Government Code section 911.2 and because Petitioners' Application to File A Late Claim With CUSD was also untimely per the one year limitation imposed by Government Code section 911.4, this court lacks justification to grant petitioners' request and the petition must be denied.

In an effort get around the statutory time limit, petitioners argue that: (1) the November 2017 letter sent to the District by petitioners "substantially complied" with the requirements of the Government Claims Act, and thereby constituted a timely claim for the purposes of the Claims Statute; and (2) that CUSD is estopped from asserting the limitations of the Claims Statute because its agents have prevented or deterred the filing of a timely claim. Neither of these arguments are persuasive.

(1) Substantial Compliance

Where a claimant has attempted to comply with the claim requirements but the claim is deficient in some way, the doctrine of substantial compliance may validate the claim "if it substantially complies with all of the statutory requirements . . . even though it is technically deficient in one or more particulars." (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713.) The test for substantial compliance is whether the face of the filed claim discloses sufficient information to enable the public entity to make an adequate investigation of the claim's merits and settle it without the expense of litigation. (*Connelly v. County of Fresno, supra,* 146 Cal.App.4th at pp. 37-38.) The doctrine of substantial compliance, however, "cannot cure total omission of an essential element from the claim or remedy a plaintiff's failure to comply meaningfully with the statute." (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1083.)

Here, petitioners argue that the November 2017 letter substantially complies with the requirements set forth in the Government Claims Act, making it a timely claim. Petitioners base this argument on the fact that the letter contained information to advise respondents that petitioners had suffered injuries as a result of Ms. Schiro's behavior. However, nothing in the November 2017 letter put CUSD "on notice" that petitioners' complaints would rise beyond an administrative action. Primarily, this is because the November 2017 letter is simply a letter. It was not written on an official claim form despite the availability of such, and it does not purport to be a "claim" of any kind.

The November 2017 letter did not include any discussion of a formal claim, or of a pending lawsuit, and no damages (or categories thereof) were listed or demanded. The letter simply stated that to "rectify the present situation, my clients seek to have CUSD fulfil its duties under their rules, policies, regulations and the law to investigate thoroughly and make the following decisions:

- Schiro be removed as Director of Pep & Cheer...

- An independent audit of the Pep & Cheer account..."

(Pet., Ex. 1 [November 2017 letter, pg 8].)

This is unlike *Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635, 643-644, a case cited to by petitioners on reply. (See Reply, filed: 4/25/19 p3 lns 1-8.) There, a document was deemed to be a claim – even though it was not on a claim form, because it disclosed the existence of a claim which, if not satisfactorily resolved, would result in a lawsuit against the entity. Monetary damages were also sought therein. (*Id.* at p. 643-644.)

Furthermore, neither petitioners nor CUSD treated the November 2017 letter as the type of written claim required under the Claims Act. In response to the letter, both parties continued to meet numerous times and sent additional letters in an attempt to informally resolve the dispute, and there was never any discussion of a formal claim or a pending lawsuit.

In petitioners' January 19, 2018 letter, they did ask the District to state its intentions "to avoid further action being taken to have the issues addressed," but "further action" was never defined. (Pet., Ex. 2 [Jan. 19, 2018 letter].) Nonetheless, this one fact is insufficient to deem the November 2017 letter adequate to satisfy the requirements of the Government Claims Act.

(2) Equitable Estoppel

"It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act." (*J.P. v. Carlsbad Unified School District* (2017) 232 Cal.App.4th 323, 333; see also *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 656.) "The purpose of the requirement that claims be filed is to provide the public entity with full information concerning rights asserted against it, so that it may settle those of merit without litigation. Therefore, the public entity cannot frustrate a claimant's ability to comply with the statutes enacted for its benefit and then assert noncompliance as a defense." (*Ard v. County of Contra Costa* (2001) 93 Cal.App.4th 339, 346-347.)

"Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.)

Here, petitioners assert claims for equitable relief under the doctrine of estoppel. However, in support of this contention, petitioners simply make a conclusory resuscitation of the elements of estoppel. They allege that: "(1) [CUSD] was apprised of the facts, (2) [CUSD] intended its conduct to be acted upon, (3) [Petitioners were] ignorant of the true state of facts, and (4) [Petitioners] relied upon the conduct [of CHS/CUSD Administration] to [their] detriment." (See Pet., p18, lns 25-28.)

No allegations are provided as to what specific facts petitioners are relying upon. However, it can be gleaned (from the petition) that petitioners felt as though they were deterred from filing a formal complaint, by respondents' promises to informally investigate their complaints – and dilatory tactics in so doing. In other words, petitioners allege that respondents ran down the clock purposefully. This though, is insufficient. It does not show that CUSD took affirmative actions to prevent or deter petitioners from filing a timely claim that would have preserved their lawsuit.

(3) Amendment and Agreed Upon Extension

Here, petitioners submit a new argument in reply, namely that their claim was timely through amendment and an agreed upon extension of time for CUSD to respond. (See Reply, filed: 4/25/19 pp 5-6 ¶ C.) This argument is inappropriate – it was not included in the petition, so respondents have not had an opportunity to respond. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank N.A*. (2002) 102 Cal.App.4th 308, 316.) Nonetheless, this argument lacks merit; it depends on a finding that the November 2017 letter constituted a claim.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/30/19 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Klein v. Professional Asbestos Removal Corp.***
Case No. 18CECG01549

Hearing Date: May 2, 2019 (Dept. 403)

Motion: By Plaintiff Ronald Klein to Quash the Subpoenas for Production of Personal Records or, in the Alternative, to Issue a Protective Order.

Tentative Ruling:

To deny the motion to quash, but grant the request for a protective order. The parties are to meet and confer and submit a protective order for the Court's signature within the next ten (10) court days. Production of documents is ordered stayed until five days after the protective order is signed by the Court.

Explanation:

A motion to quash or modify a subpoena may be made on the grounds that the matters sought to be discovered are privileged, protected, or otherwise beyond the scope of discovery. (Code Civ. Proc. §2017.010.) A motion may also be brought on the grounds that the discovery sought is unreasonable, or oppressive or is an unreasonable violation of a right to privacy. (Code Civ.Proc. §1987.1, subd.(a).)

A motion to quash a subpoena requires the filing of a separate statement. (CRC 3.145, subd.(a)(5).) No such separate statement appears in the Court's files.

Plaintiff seeks to quash, at least in part, the subpoena issued here on the grounds that it is overbroad with respect to Plaintiff's privacy rights in his medical information. Whether to quash a subpoena under such circumstances requires a balancing of several considerations. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 552.)

> "The party asserting the right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious. The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations." (*Id.* (internal quotations omitted).)

Ultimately, it does not appear that the parties seriously dispute that Plaintiff has a reasonable and legally protected privacy interest or that the intrusion is serious. The parties also do not dispute that there is a countervailing interest that would require disclosure of at least some of the information at issue here. Plaintiff has identified protective measures that would diminish the loss of privacy (in the form of a protective

order), while Defendant has failed to establish any valid objection to the imposition of a protective order.

It is also true, however, that Plaintiff has given the Court no factual or legal measure by which the Court could limit the scope of the subpoena, by suggesting a limit as to time or injury.

Therefore, the Court denies the motion to quash, but grants the request for a protective order. The parties are to meet and confer and submit a protective order for the Court's signature within the next ten (10) court days. Production of documents is ordered stayed until five days after the protective order is signed by the Court.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: RTM on 4/30/19.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Williams v. FCA US LLC, et al.***
Court Case No. 16CECG02149

Hearing Date: May 2, 2018 (Dept. 403)

Motion: Plaintiffs' Motion for Attorney's Fees and Expenses
Defendants' Motion to Tax/Strike Costs

Tentative Ruling:

To grant the motion for attorney's fees in the amount of $74,406.25; to tax costs and expenses in the amount of $13,980.00 of the $33,153.60 claimed. Payment shall be made by defendant FCA US LLC to the Knight Law Group within 30 days of the clerk's service of this minute order.

Explanation:

Motion for Attorney's Fees:

A prevailing buyer in an action under the Song–Beverly Act "shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (Civ. Code, § 1794, subd. (d).) The statute "requires the trial court to make an initial determination of the actual time expended; and then to ascertain whether under all the circumstances of the case the amount of actual time expended and the monetary charge being made for the time expended are reasonable. These circumstances may include, but are not limited to, factors such as the complexity of the case and procedural demands, the skill exhibited and the results achieved. If the time expended or the monetary charge being made for the time expended are not reasonable under all the circumstances, then the court must take this into account and award attorney fees in a lesser amount. A prevailing buyer has the burden of 'showing that the fees incurred were "allowable," were "reasonably necessary to the conduct of the litigation," and were "reasonable in amount." ' " (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 104.)

Calculating the Fees

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48; *Robertson v. Fleetwood Travel Trailers of California, Inc*. (2006) 144 Cal.App.4th 785, 817 [lodestar applies to Song-Beverly litigation].) Here, plaintiffs seek a loadstar of $62,220.00. As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably*

expended multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095, italics added; *Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method '"is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.' " (*Serrano III*, *supra*, 20 Cal.3d at p. 48, fn. 23.)

1. Number of Hours Reasonably Expended

Here, the Knight Law Group spent 69.1 hours on the case and the Rosenstein Law Offices spent 93.1 hours with an additional anticipated 11 hours for a reply to the motion for fees, a hearing and post hearing activities. I've poured over the bills in detail. There is very little to complain about.

Allegations of Overbilling

Defendants criticize plaintiffs for using two law firms and a total of 12 attorneys, claiming "all of whom duplicated much of the work that Plaintiffs' counsel uses in every other case they handle against FCA." However, the multiple small billing entries by both of plaintiffs' firms illustrated the template driven nature of plaintiffs' counsel's practice. The bills establish that less time was billed to the case than would otherwise be needed because of the use of forms. This efficiency is appropriate. Plaintiffs' counsels' utilization of many attorneys all of whom specialize in discrete parts of litigation (propounding discovery, responding to discovery, law and motion work, depositions, etc.) is a viable cost control. The Court has scrutinized the billings and is satisfied that the time incurred is for time actually spent, and reasonably incurred, to litigate the case.

Duplication of Effort

Defendants contend that the Rosenstein firm duplicated tasks done by the Knight Law Group, "[e]xamples of inherent duplication by LOMR relating to 'file review' and 'getting up to speed' include, inter alia, time entries on 10/02/17 ($1,625.00), 10/18/17 ($1,785.00), 11/08/17 ($412.50), and 11/20/17 ($275.00)." However, the time entries for October 2, 2017 and October 18, 2018, include initial case intake and review plus a host of litigation management tasks appropriate to co-counsel. It is moreover appropriate that the attorney responsible for trying the case have actually read the critical documents and client depositions. With respect to November 8, 2017, the file review was in the context of drafting the MSC Statement and was inevitable. Finally, the November 20, 2017, file review was in the context of preparing for the mandatory settlement conference, and was accordingly necessary.

Although not cited by defendants, there are a very few instances where both firms billed for the same tasks. On November 21, 2017 timekeeper SBM billed .2 hours for "review NOD of Anthony Micale and NOD of Barbara Luna" On November 29, 2017, timekeeper BM of the Rosenstein firm billed .2 hours for "received and reviewed Defendants notice of deposition of plaintiff's experts; coordinated with staff regarding response to the same; directed associate attorney regarding objections to defendants

Notice of Deposition of plaintiffs' experts." Accordingly, SBM's .2 hours will be disallowed, for a deduction of $110.00.

Also, on February 2, 2018, timekeeper ALM of the Knight Law Group billed .1 hours to "Draft objections to Defendants' Supplemental Designation of Jan Swart," while on February 3, 2018, timekeeper RH of the Rosenstein firm billed .30 hours to "Drafted plaintiffs' objections to Defendants' supplemental designation of expert witness Jan Swart." This is the same task and the court will cut the .1 hours billed by ALM for a total deduction of $35.00.

On June 18, 2018, timekeeper SBM of the Knight Law Group billed .1 hour for "Review FCA's NOD of James Bielenda" and on the same date timekeeper MR of the Rosenstein law firm billed .10 to "Received and reviewed Defendants' notice of deposition of James Bielenda; directed staff and associate attorneys regarding the same." The court deducts the .1 of timekeeper SBM for a deduction of $55.00.

On June 27, 2018, timekeeper SBM billed .2 hours to "Review First Amended NOD of Anthony Micale and First Amended NOD of Barbara Luna," whereas on June 26, 2018, timekeeper MR billed .10 hours to "Received and reviewed defendants' first amended notice of deposition for Anthony Micale and Defendants first amended notice of deposition for Dr. Barbara Luna; directed staff and associate attorneys regarding the same." The court will reduce timekeeper SBM's time by .2 hours for a deduction of $110.00.

The total deduction for duplicated tasks is $310.00.

Travel Time

Travel time is not per se unreasonable. Plaintiffs are free to choose counsel out of the Central Valley and those attorney will then have to travel to the clients' depositions, the vehicle inspection and defendants' depositions. The Court will not deduct travel time, finding it reasonably necessary.

Alleged Excessive Time

Defendants cite timekeeper AM's four hours spent drafting written discovery as excessive because the work was not "partner level" and used templates. Four hours is a fair time to review the file, draft form interrogatories, special interrogatories, requests for production, and requests for admission. The Court has seen more time spent in smaller cases.

Defendants also take exception to timekeeper AM billing $280.00 for drafting a Stipulated Protective Order for .8 hours. Defendants assert that this type of work involves adapting templates, and would performed more appropriately by a junior associate or paralegal. However, about 45 minutes spent revising a template form to reflect a specific case is not excessive, or beneath a partner.

Finally, defendants object to timekeeper AM billing $775.00 for drafting Notices of Deposition. Nineteen Notices of Deposition were drafted, along with a cover letter. The time spent, 2.1 hours, is not excessive for this task, nor is the type of work unsuitable for a partner.

"Unreasonableness" of Fees

The law requires the court to first determine the actual amount of time expended by counsel, then, second, to determine if that time and fee was reasonable. (*Nightingale v. Hyundai Motor America*, supra, 31 Cal.App.4th at p. 104.) Factors effecting reasonableness may include, "the complexity of the case and procedural demands, the skill exhibited and the results achieved." (*Ibid*.) Consumer litigation regarding automobiles is not for the casual lawyer. The learning curve is steep and the tenacity, skill, and funds of the defendants are impressive. The results achieved in this action are quite good, even when compared to the demands of the complaint, which must necessarily constitute the outer limits of plaintiffs' demands. As edited above, the court cannot say the fees requested were unreasonable.

2. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133.) Ordinarily, "'the value of an attorney's time . . . is reflected in his normal billing rate.'" (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 761.)

The rates for plaintiff's counsel are higher than Central California's going rates for comparable consumer litigators, i.e., $550.00 per hour for Steve Mikhov (16 year lawyer) and Michael Rosenstein (26 year lawyer); $400 per hour for Matthew Evans (11 year lawyer); $375.00 per hour for Diane Hernandez (32 year lawyer) and Kristina Stephenson-Cheang (11 year lawyer); $350.00 per hour for Amy Morse (6 years' practice), Brian T. Shippen-Murray (7 years' practice) and Diane Hernandez (32 year lawyer); $275 for attorney James Martinez (3 years' practice) and attorney Raymond Hay (3 year lawyer); $250 for attorney Artin Afkhami (1.5 years' experience) and attorney Daniel Kalinowski (4 year lawyer); plus $200 per hour for Michelle Lumasag (3+ year lawyer). Where a party is seeking out-of-town rates, he or she is required to make a "sufficient showing…that hiring local counsel was impractical." (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1244.) Plaintiff has made no showing of any attempt to seek local counsel.

This court has awarded William Krieg, a consumer and lemon law attorney with over 40 years of experience, fees based on a rate of $425 per hour in *Torres v. Cain Business Enterprises, Inc.*, Fresno Superior Court Case No. 13CECG00345. (See Minute Order dated March 3, 2016.) We awarded the Knight Law Group, LLC, counsel herein, fees ranging from $400 an hour to $225 an hour in *Tapia v. Hyundai Motor America*, Fresno Superior Court Case No. 15CECG01433. (See Minute Order dated October 6, 2017.) We awarded fees to the Knight Law group ranging from $400 per hour to $250 per hour in *Metzger v. FCA US LLC, et al*., Fresno Superior Court Case No. 16CECG02922

on August 30, 2018. We also awarded similar fees to the Knight Law Group in *Bolton v. Ford Motor Company*, Fresno Superior Court Case No. 16CECG02700. (See Minute Order dated October 4, 2018.) The court intends to reduce Mikhov's rate to $450, Rosenstein's rate to $500, Evans' rate to $375, leave Hernandez' and Cheang's rates at $375, leave Morse's and Murray's rate at $350 per hour, drop Martinez, Hay and Afkhani to $225 and leave Lumasag's rate at $200 per hour. This results in a total fee of $57,705, taking into account the .6 hour reduction for duplicate billing.

Fee Agreement

Defendants argue that without evidence of plaintiffs' actual fee agreement, there is no evidence this case was truly contingent. However, Mikhov's declaration indicates this case was taken on a contingency and costs advanced at paragraphs 2 and 60.

3. Multiplier

Plaintiff seeks a multiplier of 1.5 to apply to the lodestar. A multiplier enhancement to the lodestar "is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138.) A multiplier may also be applied where the attorney has shown extraordinary skill, resulting in exceptional results. (*Ibid*.; *Graham*, *supra*, 34 Cal.4th at p. 582.) Courts have substantial discretion to select the factors they deem relevant to their multiplier analysis. (*Lealao v. Beneficial California, Inc*. (2000) 82 Cal.App.4th 19, 40–41.) The factors include: (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, based on the uncertainty of prevailing on the merits and of establishing eligibility for the award. (*Robertson v. Fleetwood Travel Trailers of California, Inc*. (2006) 144 Cal.App.4th 785, 819.)

a. Novelty and Complexity of the Issues

In *Blum v. Stenson* (1984) 465 U.S. 886, the Supreme Court discussed what might be a basis for an upward adjustment to the lodestar. (*Blum*, *supra*, 465 U.S. at p. 886.) The Court noted that certain suggested bases for an upward adjustment were not warranted because they were already reflected in the lodestar. (*Id*. at p. 898.) Specifically, "[t]he novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates." (*Ibid.*) This was a lemon law case of ordinary complexity and no particular novelty. Counsel was appropriately compensated through the time they billed.

b. The Skill Displayed

In general, "special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." (*Blum*, *supra*, 465 U.S. at p. 889.) As our Supreme Court has observed, "[t]he factor of extraordinary skill, in particular, appears susceptible

to improper double counting; … a more skillful and experienced attorney will command a higher hourly rate. (*Ketchum*, *supra*, 24 Cal.4th at p. 1138-1139.) "Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable." (*Id*. at p. 1139.)

Here, the Court has read all of the pleadings filed in this case and was the trial court. The skill displayed by plaintiffs' counsel was quite good, but not extraordinary. Counsel's hourly rates are adequate compensation.

c. The Contingent Nature of the Case

This is the most important factor in awarding a multiplier. Our Supreme Court has explained: "[The multiplier] for contingent risk [brings] the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138.) The court further noted that applying a fee enhancement does not inevitably result in a windfall to attorneys: "Under our precedents, the unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk … The adjustment to the lodestar figure, *e.g.*, to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Ibid*; see also *Horsford v. Board of Trustees*, *supra*, 132 Cal. App. 4th at pp. 399-400.)
This factor weighs in favor of a multiplier.

d. Results Obtained

Plaintiff's counsel obtained an excellent result. This factor weighs in favor of a multiplier.

e. Preclusion of Other Work

There is no evidence that the plaintiffs' attorneys were unable to take other work because they were working on plaintiff's case.

Considering all of the lodestar factors, the court imposes a multiplier in favor of plaintiff's counsel, but not the full 1.5 multiplier counsel requests. Instead, it grants a 1.25 multiplier, which compensates counsel for the risk of taking the case on a contingent fee basis, and the excellent results they achieved, but also takes into account the fact that the case was a fairly routine lemon law action that did not greatly hamper counsel's ability to litigate other cases.

This results in a fee of 1.25 x $57,705 = $72,131.25.

Motion to Tax Costs & Expenses:

Defendant seeks to tax and or strike plaintiffs' expert fees and travel expenses.

Expert Fees – Dr. Luna

Defendant contends that $20,460.25 for fees spent for plaintiffs' expert, Dr. Barbara Luna should be taxed on the grounds that Dr. Luna's testimony in this case was nearly identical to that given in a hundred or more other cases against defendant. Dr. Luna's sole purpose in this case was to testify concerning alleged fraudulent concealment by Defendant. Dr. Luna spent 66 hours on the case. Plaintiffs contend that Luna's investment of time was necessary to prepare two declarations and to prepare for her deposition. However, there was no law and motion work in this case and no call for Dr. Luna to prepare any declarations. Moreover, she admitted she prepared no declarations in this matter at her deposition. (See Roubinian Decl., Exh. B (Deposition of Barbara Luna at 11:24-12:7) As such, the need for Dr. Luna to prepare "declarations" is not reasonable necessary and the court deducts $13,980.00 of Dr. Luna's fees.

Expert – Mr. Micale

Anthony Micale was plaintiffs' automotive expert. Mr. Micale oversaw the inspection of plaintiffs' vehicle and prepared for his deposition, which was demanded by defendants but never went forward due to Micale's unavailability, and the ultimate settlement. His time, including travel from his office in Solvang to Fresno for the vehicle inspection, and return trip, was reasonable. Defendants have not shown there was an expert of comparable qualifications who was located closer to Fresno. Likewise, defendant have not shown that the time spent preparing for a deposition that Micale had to cancel was time wasted, given that his deposition was rescheduled.

Travel Expenses

Plaintiff's counsel charged federal tax rates for mileage for the vehicle inspection in Fresno, the Mandatory Settlement Conference, and the Trial Readiness Conference. These are appearances where telephonic contact is not sufficient. The court will not tax the travel expenses.

Additional Attorney's Fees Incurred

Plaintiffs' counsel seeks 5.5 hours at a rate of $350, for preparing the opposition to the motion to tax costs, plus an anticipated 8.5 hours for a hearing on the matter. Defendants do not contest these fees in their reply. The court will allow additional attorney's fees of $2,275 representing 6.5 hours of work. Any appearance can be made by CourtCall.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: RTM on 4/30/19 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(2)

Tentative Ruling

Re: ***In re Brandon Velazquez***
Superior Court Number: 19CECG01225

Hearing Date: None.

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/29/2019.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***James v. Wells Fargo Bank, N.A.***
Court Case No. 13CECG00085

Hearing Date: May 2, 2019 (Dept. 501) @ 3:00 p.m.

Motion: Wells Fargo Bank, N.A's Motion to Expunge Lis Pendens

Tentative Ruling:

To grant. (Code Civ. Proc., §§ 405.31-405.32.)

Explanation:

The lis pendens recorded by plaintiff when he filed this action should be expunged since the dismissal means that plaintiff no longer has a "pending action" raising a "real property claim" against Wells Fargo Bank, N.A. (See, *e.g., Cornell v. Select Portfolio Servicing, Inc.* (E.D. Cal., Nov. 29, 2011, No. CIV S-11-1462 KJM) 2011 WL 6097721, at *2 [court has inherent power to expunge lis pendens, even after dismissal of the action].)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/1/2019 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Figueroa v. Figueroa, et al.***
Court Case No. 16CECG01169

Hearing Date: May 2, 2019 (Dept. 501 at 3:00 p.m.)

Motion: Motion to Confirm Sale of Partitioned Property

Tentative Ruling:

To grant.

Explanation:

The sale of 4199 South Cedar Avenue, Fresno California, APN 330-150-01 shall be confirmed to Jose R. Rodriquez Carreon. The court has reviewed the report and recommendation of referee James Philips and is satisfied that the sale is in the best interests of all parties. (Code Civ. Proc § 873.730.)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 5/1/2019 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(03)

Tentative Ruling

Re: ***Workman v. Bray***
Case No. 17CECG03679

Hearing Date: May 2, 2019 (Dept. 502)

Motion: Defendant Dawn Bray's Motion to Set Aside Default

Tentative Ruling:

To grant defendant Dawn Bray's motion to set aside the default entered against her on February 11, 2019. (Code Civ. Proc. § 473, subd. (b).) To order defendant to file her answer to the second amended complaint within 10 days of the date of this order. To order defense counsel Gregory Roberts to pay plaintiff's attorney's fees in the amount of $500. (*Ibid*.) Defense counsel shall pay the fees within 30 days of this order.

Explanation:

Defendant Dawn Bray moves for relief from the default and default judgment under the attorney affidavit of fault provision of Code of Civil Procedure section 473, subdivision (b). Under that provision,

> Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. (Code Civ. Proc., § 473, subd. (b).)

Thus, as long as the motion is timely and the attorney has submitted a declaration stating that the default or default judgment was entered due to his or her mistake, inadvertence, surprise or neglect, relief is mandatory, regardless of whether the error was reasonable or not. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 681-682.) As long as it appears that the default was actually the result of the attorney's mistake or neglect, and not the client's fault, the court must grant relief. (*Zamora v. Clayborn Contracting Group* (2002) 28 Cal.4th 249, 257.)

Here, defendant filed her motion for relief from the default about 15 days after the default was taken against her and no default judgment has been entered yet, so

the motion is timely. Also, defense counsel has provided a declaration stating that the default and subsequent judgment were entered entirely as the result of his own mistake or neglect, not the mistake of his client.

Mr. Roberts explains that he was informed by his clients, David Bray, Jr. and Dawn Bray, that they had had been added as defendants in the action in November or December of 2018, and that he spoke with his clients in December of 2018, when he was informed that they had been served with the second amended complaint. (Roberts decl., ¶¶ 4, 6.) They decided to serve a joint settlement offer with the other defendants on plaintiff to resolve the matter, but Mr. Roberts was unable to get the other defendants to agree on a joint offer. (*Id*. at ¶ 6.) In January of 2019, Mr. Roberts again spoke with his clients and they authorized him to make a settlement offer to plaintiff. (*Id*. at ¶ 7.) He sent plaintiff's counsel a settlement offer on January 24, 2019. (*Ibid*.) He also appeared at a mandatory case management conference on January 29, 2019, at which time he informed the court that he represented defendants and that he would be filing an answer on their behalf. (*Id*. at ¶ 8.)

In the meantime, defense counsel started immunotherapy treatment for cancer. (*Id*. at ¶ 9.) He has continued to work during his treatments, but "I am not getting things done as fast as I used to or as well as I think I can." (*Ibid*.) He was waiting for a response from plaintiff regarding the settlement offer, and he had prepared a general denial on behalf of his clients. (*Ibid*.) However, he learned on February 13, 2019, that Dawn Bray's default had been taken. (*Id*. at ¶ 10.) When he contacted plaintiff's counsel about the default, she stated that she had responded to the settlement offer on January 30, 2019, and that she would not agree to set aside the default. (*Id*. at ¶ 11.) "The fault for not filing a timely answer is 100% my fault. I spoke with my clients in December after they were served with the complaint and told them I would respond to the complaint on their behalf. My clients thought I was taking care of the matter. They are extremely upset with me that DAWN's default has been taken." (*Id*. at ¶ 13.)

Thus, the affidavit submitted by defense counsel indicates that the failure to file an answer or general denial on behalf of Dawn Bray was entirely his fault, and that Dawn Bray had nothing to do with the failure to file the response in time to prevent the default. There is no evidence that would tend to show that it was the client's fault that the answer was not filed in a timely manner, and it appears that it was the attorney's decision to wait for a response to the settlement offer rather than immediately file an answer that led to the default. Consequently, relief from the default is mandatory under the attorney affidavit of fault provision of section 473, subdivision (b).

Plaintiff argues in opposition that the motion should be denied because defendant has not provided an adequate excuse for her failure to file an answer, and that defendant waited an excessive time before bringing her motion for relief. However, it appears that plaintiff has conflated the requirements for obtaining discretionary relief under the first part of section 473(b) with the somewhat different standard for relief under the mandatory attorney affidavit of fault provision of section 473(b).

As discussed above, where the party moves for relief from a default in a timely manner based on their attorney's affidavit stating that the default was taken due to his or her mistake or neglect, whether excusable or not, relief from the default is mandatory. (Code Civ. Proc. § 473, subd. (b); *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 989.) Also, there is no requirement that the moving party show diligence under the mandatory attorney affidavit of fault provision, as long as the motion is brought within six months of entry of the default judgment. (*Ibid*.)

The requirements for mandatory relief are less stringent than the requirements for discretionary relief under the first part of section 473(b), which includes the requirements that the motion be filed within a reasonable time, not to exceed six months from entry of the default or default judgment, and that the moving party show a reasonable excuse for the default. (*Austin v. Los Angeles Unified School District* (2016) 244 Cal.App.4th 918, 928-929.) "Within the context of section 473(b) neglect is excusable if a reasonably prudent person under similar circumstances might have made the same error." (*Id*. at p. 929.)

Here, defendant seeks relief under the mandatory attorney affidavit of fault provision of section 473(b), so neither she nor her attorney have to establish that the mistake or neglect that led to the default were reasonable and excusable. As long as the attorney states in his declaration that the default was entered due to his own mistake, as he has done here, then relief is mandatory. Likewise, the moving party does not have to show that the motion was brought within a reasonable time, as long as it was brought less than six months before the default judgment. In the present case, no judgment has been entered, and the motion was brought less than a month after the default was entered against defendant. Therefore, the motion is timely. Indeed, even if there were a requirement of diligence in seeking relief from the default under the mandatory attorney affidavit of fault provision, the defendant was clearly diligent here, since she brought her motion just over two weeks after the default was entered. Nor is there any indication that plaintiff has suffered any particular prejudice from the minimal delay in bring the motion. As a result, the court intends to grant the defendant's motion to set aside the default against her.

Finally, the court intends to order defendant's counsel to pay plaintiff's attorney's fees and costs associated with the entry of default and the motion for relief from the default. Under the mandatory portion of section 473(b), "[t]he court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." (Code Civ. Proc. § 473, subd. (b).)

Here, plaintiff's counsel claims to have incurred $4,500 in fees and costs in the case. However, it appears that some of the requested fees are not directly related to the entry of the default or the motion to set aside, since plaintiff's counsel includes fees and costs for drafting and filing the complaint. (Pfister-Bogart decl., ¶ 12.) The court will not award fees or costs that are not related to the default that is the subject of the present motion, since plaintiff would have had to incur these costs regardless of whether the default was entered or not.

Plaintiff's counsel also seeks fees based on 8 hours of attorney time for drafting and arguing the opposition to the motion to set aside the default. (*Ibid*.) However, since the motion is based on the mandatory attorney affidavit of fault provision of section 473(b) and plaintiff's counsel has failed to cite to any facts or authorities that would support denial of the requested relief, spending 8 hours on opposing the motion was clearly excessive. Therefore, the court will not award the full amount of fees sought by plaintiff's counsel. Instead, the court intends to order defense counsel to pay plaintiff's counsel's fees of $500, based on two hours of attorney time billed at $250 per hour.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling DSB 4-30-19

Issued By: _____ on _____.

(Judge's Initials) (Date)

(28) **Tentative Ruling**

Re: ***Delgado-Perdomo v. Pimentel***
Case No. 17CECG00057

Hearing Date: May 2, 2019 (Dept. 502)

Motion: By Carlota Pimentel for Joinder.

Tentative Ruling:

To deny the motion.

Explanation:

Ms. Pimentel has filed this motion for joinder to be added to the case as a plaintiff on the grounds that she has an interest in the action pursuant to Code of Civil Procedure §378. The proper name for such a motion is a motion for intervention, and the Court will treat it as such.

Ms. Pimentel asserts that she first gained knowledge of this action and the cloud on her title in September of 2018. She does not explain her delay in filing this motion.

Nevertheless, it is the case that parties may intervene, if otherwise appropriate, at any time, even after judgment. (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437.) Here, among other things, Pimentel alleges that the subject property was transferred to her prior to judgment being entered and so there is a dispute as to the proper ownership of the property. However, even assuming that Ms. Pimentel has made the case that she can intervene as a matter of right, such an intervention would be futile at this point without setting aside the default judgment. Since the default was entered on February 21, 2017, the time to set aside the default has long since passed. Therefore, reopening the case would be futile. (See *Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267, 273 (setting aside default judgment without setting aside default would be an idle act and not permitted even if timely).)

The failure to join a party is not a jurisdictional defect, and there is nothing that compels a party to intervene in an action. (*Cf. County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1151-53; *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 693 (judgment without an indispensable party "is subject to later collateral attack by the nonjoined indispensable party.").)

Therefore, for all these reasons, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The

minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling DSB 5-1-19

Issued By: _____on_____.
(Judge's initials) (Date)

Tentative Rulings for Department 503